First Transit, Inc., successor with liability to Ryder/ATE, Inc. *and* Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters. Cases 21–CA–32146 and 21–CA–32285

July 28, 2008

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On February 22, 2008, Administrative Law Judge James M. Kennedy issued the attached second supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the second supplemental decision and the record in light of the exceptions[2] and briefs[3] and has decided to affirm the judge's rulings, findings,[4] and conclusions[5] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Second Supplemental Order of the administrative law judge and orders that First Transit, Inc., successor with liability to Ryder/ATE, Inc., Pomona, California, its officers, agents, successors, and assigns, shall satisfy the obligation to make whole the following claimants by paying them the following amounts, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.

Name of Backpay Claimant	**Net Backpay**
José Avalos	-0-
Denny Benavides	$4,796.80
Shawn Howell	34,597.40
Ike Johnson a/k/a Ikey Williams	50,856.94
Marcus Nelons	-0-
Valerie Pedraza	25,703.18
Tyrice Turner	2,149.94
Total Net Backpay	**$118,104.26**

Dated, Washington, D.C. July 28, 2008

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Peter C. Schaumber, Chairman

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Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] No party has excepted to the judge's backpay determinations concerning employees José Avalos, Marcus Nelons, and Tyrice Turner. In addition, no exceptions were filed to the judge's findings that: (1) the backpay of Ike Johnson (a/k/a Ikey Williams) should terminate at the time he suffered a stroke that disqualified him from driving professionally; (2) Shawn Howell did not quit her driving job with Diversified Paratransit, but rather that she was discharged; and (3) Howell's earnings from hairdressing should not be offset against her backpay.

[3] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] The Respondent claims that the backpay of claimant Denny Benavides should be tolled as of his arrest in late September, 1999 because under any attendance policy embraced at that time by the Respondent, "Benavides would not have been allowed a week off, especially on short notice." In so arguing, the Respondent claims that Benavides was jailed for a week, not the 2-3 days found by the judge. We find that, even if Benavides was jailed for a week, the Respondent did not meet its burden of proving that Benavides would necessarily have been discharged for that absence under the Respondent's attendance policy. The Respondent presented no evidence showing how it handled absences for arrests in the past and did not show that discharge would have been inevitable under these circumstances. Accordingly, we agree with the judge that Benavides' backpay should not be tolled as of his arrest in late September.

[5] In its exceptions, the Respondent argues, inter alia, that in evaluating claimant Shawn Howell's entitlement to backpay, "the ALJ did not take into account that Howell quit her Laidlaw job to go back to school." R. Br. 11. We find that Howell's decision to quit her interim Laidlaw job did not nullify her right to backpay for the entire backpay period. In 1999, Howell found employment at Laidlaw, where she worked until 2001, when she left that job to attend school to study medical billing. While at school she applied for jobs at the school. After 2 months, her financial aid request was denied, and she quit school to return to work. She then began working at Pasa Alta Manor, where she worked for a year and a half. We find that Howell's decision to resign from Laidlaw was reasonable. She testified without dispute that she left to attend school to create a better life for her family, and she attended school only for 2 months, during which time she continued to look for work. Considering the backpay period as a whole, we find that Howell's efforts to mitigate backpay were reasonable, and that Howell's decision to quit her interim Laidlaw job did not disqualify her from backpay for the entire backpay period. We note, in this regard, that the Respondent does not specifically argue that the 2-month period during which Howell attended school should be excluded from backpay.

Lisa E. McNeill, Esq., for the General Counsel.
Douglas N. Silverstein, Esq. (Kesluk & Silverstein), for the Respondent.

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This supplemental compliance hearing was tried in Los Angeles and Lancaster, California, on 3 hearing days, August 21 and September 21–22, 2007. In a literal sense it is the completion of the task begun on July 29, 2005, when I issued a decision resolving the initial compliance specification arising from the Board's Order in 331 NLRB 889, dated July 31, 2000. That Order was enforced by the Court of Appeals for the District of Columbia Circuit on October 17, 2001. In the initial compliance proceeding, I adjudicated the claims of 38 claimants. Also during that proceeding, the parties stipulated that there were six individuals who had either died or who had not been located. It preserved the claimant status of the those six for a supplemental hearing. I later added, on a motion of the General Counsel, a seventh individual. The circumstances of six of the seven have now been litigated here. The seventh has been given the opportunity to do so, but never appeared.

On August 17, 2007, 4 days before the instant hearing opened, the Board issued its decision in the initial compliance proceeding, substantially affirming it. 350 NLRB No. 68; corrected on October 11. Most of my findings and conclusions were affirmed, though there were some disagreements and some modifications. According to the parties, Respondent has appealed that decision to the D.C. Circuit.

There are some agreed-upon limitations concerning the nature of the evidence. First, it should be understood that all of those limitations were put in place for the initial compliance proceeding and the parties are in agreement that they remain in place here. The principal stipulation is that the parties agree that the individuals named in the initial compliance specification (including the seven being dealt with here) "were discharged, suspended or otherwise denied work opportunities as a result of Respondent's unlawfully instituted attendance policy." Respondent, in the stipulation, obtained a reservation to the effect that it could still argue that the individuals were probationary employees and could have been lawfully discharged for failing to complete their probationary period; that certain employees would have been discharged under the prior attendance policy and that certain employees had resigned their employment and were not discharged and that some were not discharged pursuant to the policy. The stipulation describes an agreement over the formula for gross backpay, leaving for litigation the issue of mitigation. A later stipulation, much like the first, is specifically aimed at this proceeding.

In addition, the parties are in agreement that they may cite to the record of the 2005 proceeding, as appropriate, and they have done so. For example, Respondent has cited the 2005 testimony of its experts, Martin Gombert, and Wayne Fritz, concerning the availability of bus driving jobs in greater Los Angeles during the backpay periods. I did not find their testimony particularly helpful or persuasive in the previous proceeding and I continue to hold that view. Even if their testimony is credited concerning the availability of such jobs, those observations about the job market as a whole, bear little upon specific individuals set adrift by the unfair labor practices. Such individuals find themselves in circumstances unique to themselves and are not the commodity the experts suggest they are. Each of the dischargees had to find his or her own way and the fact that a job market might be favorable does not mean that everyone will have the successful experience the experts seem to think they should; in fact, the market is usually subdivided for a discriminatee into smaller geographical areas more closely connected to the location of that person's residence.

Furthermore, a job commute that may have been acceptable to the dischargee at the time of his or her hire by Respondent may not be reasonable for them when the 'comparable' job that Fritz or Gombert spoke of is located in a more distant city. In any event, compliance proceedings are more fair when the individual's specific circumstances can be scrutinized. That fairness is not present not when a nebulous market overview is applied to a specific individual. Although I did not specifically say that in my 2005 decision, I did imply it. Given Respondent's heightened argument now, I address it in this manner: The job market for bus drivers in Southern California is part of the make-whole equation, but insufficient to control the findings regarding specific individuals, at least without a showing of a specific impact upon that individual. It cannot be allowed to override what each discriminatee faced after his or her discharge.

In point of fact, however, Respondent's argument does not really apply to the seven individuals discussed here. For the general principles applicable to the backpay claims in this case, I will simply refer the reader to my earlier decision and to the Board's commentary on review. It will serve no purpose to restate what was said there. The parties well understand the dynamics and are operating under them.

I will repeat, for context's sake, the observation I made then for claimant Donald Duplessis. It is worth remembering that these claimants were not discharged under Section 8(a)(3) as union activists. These were victims of an 8(a)(5) unilateral change. In 8(a)(3) cases, the dischargees' identities are usually known and Regional compliance officers routinely notify them of their obligation to keep records of their job searches. That is not the routine in an 8(a)(5) case such as this; indeed, the victims are not usually identified until the compliance stage. For that reason, I said in the Duplessis discussion portion of the case (350 NLRB No. 68, slip op. at 10–11):

> Duplessis, like most of these claimants, did not know until the compliance stage began, sometime after the court judgment of October 17, 2001, that he was a victim of an unfair labor practice. Thus, he and the others remained unidentified for years while the case was processed. As a result no one, not the Union, not the Board's Regional Director and not the employing entities, was able to advise them to keep job search records or to mitigate by finding employment. Moreover, many of them could not be readily found, having dispersed to a wide variety of locations within Southern California, a large, heavily populated area. . . .

That observation continues to have pertinence in this second supplemental proceeding.

There are two other issues of a procedural nature that will be addressed. The first is the question of the applicability of the stipulation on missing and deceased discriminatees to one individual who never appeared—Marcus Nelons. The other is a request to take judicial notice or, alternatively, to reopen the record. This question is connected to the claim of Ike Johnson a/k/a Ikey Williams. Each of these matters will be discussed in the section dealing with those individuals.

Both the General Counsel and Respondent have filed timely briefs and they have been carefully considered. I therefore proceed directly to the individual claims.

The Claimants

José Avalos

José Avalos' backpay period begins July 24, 1998. The General Counsel has, based on the testimony of his widow Maria Avalos, modified the backpay claim. The current calculations are seen in Avalos' Exhibit 5. Among other things, the revised calculation recognizes that Avalos was unable to perform work after being hospitalized in November 1999 and learning that his cancer was terminal. In addition, it became apparent that his Social Security earnings record was incorrect as it shows earnings from interim employer Ampco Systems Parking as having been earned in 2000. Since he was unable to work after November 1999, the modification has properly posted those interim earnings to the fourth quarter of 1999. The net backpay figure now being sought has been reduced to $6651.77.

Respondent's defense is that Avalos was not discharged pursuant to the unlawfully imposed absentee rules but was discharged for reasons unrelated to absenteeism. The evidence is in conflict. The General Counsel, quite reasonably, relies on Ryder's employee profile and change form which was issued at the time of the discharge and found in Avalos' personnel jacket. That document, dated August 22, 1998, unambiguously states that Avalos was discharged for absenteeismBox 34 Status Reason: "DISC-ATTND/TARDY," 'DISC' being an abbreviation for 'discharge.'

Respondent has presented other documentation which strongly suggests that the discharge was actually because Avalos failed to make destination announcements over his coach's public address system. Ryder required drivers to make such announcements to comply with the Americans with Disabilities Act. Respondent argues that Ryder's profile and change slip was simply miscoded and the true reasons are established by other evidence. Indeed, the Union's grievance of August 17, 1998, notes taken by operations manager Laurie Dobson at the grievance meeting held August 24 and her follow-up letter to the Union that same day all support that contention. These documents, too, came from Avalos'personnel jacket. Dobson did not testify in either the previous proceeding or the current one even though her name was mentioned frequently in both. Instead, Respondent asked Sal Garcia, who in 1998 was Ryder's safety manager, to testify. He is now Respondent's assistant general manager. Garcia testified that he attended the August 24 grievance meeting which Dobson wrote about and confirmed the accuracy of what the documentation has recorded.

The Union's grievance is relatively minimal, simply asserting that it wished to have a meeting concerning Avalos's termination. It did not incorporate a no-just cause theory as part of the grievance, but simply requested a discussion about the reasons for Avalos's discharge. Dobson's confirmation letter asserts that Avalos "was terminated on July 28, 1998 after failing to comply with legal requirements of calling ADA announcements three times within one year." After receiving the letter, the Union did not pursue Avalos's grievance any further and let the matter drop. There is no evidence that Avalos ever disputed that reason.

Frankly, comparing the details set forth in Dobson's letter to the minimal coding in the personnel change form, I find that it is more likely than not that the change form incorrectly coded Avalos' discharge as being related to the attendance rule, when it was not. The entire discussion relating to his discharge is focused only on his failure to make next-stop announcements.

I find, therefore, that Avalos was not a victim of the improperly imposed attendance rule. It follows that Avalos is not entitled to backpay under the Board's remedial order.

Denny Benavides

Ryder hired Denny Benavides as a driver-trainee in January 1999, assisting him to become licensed as a professional driver. Through Ryder's training program he earned a Class B drivers license with a passenger endorsement. He was terminated on August 13 that year having acquired sufficient attendance points to warrant his discharge under the unlawfully imposed attendance system. Although his backpay period actually extends from August 14, 1999 to January 23, 2002, he was incarcerated in late December 1999. As a result, backpay is only sought from the date of his discharge until his incarceration. The figure sought is $4796.80, covering only the third and fourth quarters of 1999.

Although Respondent doubts Benavides' testimony that he sought interim employment after his discharge, there is really no reason to question his testimony. He said he applied for bus driving jobs with the Metropolitan Transportation Authority (Los Angeles's city bus system) and OMNI Transit (in San Bernardino). He also remembered applying for retail sales jobs with some local grocery chains (he no longer remembers the names) and the 99¢ Only Store chain. He testified that he became quite worried over his lack of success as he was trying to support a newborn child. He also used an unemployment agency to no avail.

Benavides was arrested in late September on charges of transporting marijuana, but was only jailed for 2 or 3 days. He was released and continued to seek work, applying for work with American Tower, a construction company. His trial began sometime in mid-December and he was found guilty later that month. He began serving his sentence of 30 months around that same time.

Respondent principally argues that Benavides should be denied backpay as of the date of his arrest, in September, meaning the entire fourth quarter claim should be stricken due to its zero-tolerance policy concerning drugs and alcohol. I am not

persuaded. It seems to me that the Regional Director's specification is entirely in accord with Board practice, which focuses primarily on the claimant's efforts in the job market.

But beyond that, Respondent's argument falls short. I do agree that Respondent had a zero-tolerance policy. Garcia's testimony in the earlier case is appropriately requoted here.

> A. Our drug and alcohol policy is zero tolerance. We have pre-employment and if a person comes out dirty, on a pre-employment, that employee that person will not be hired, by the Company.
>
> We have a random poll, which is Federal guidelines; we follow that. We, also, have reasonable suspicion and, unfortunately, we have had people, sometimes, fail the random and a few people, we have identified, as reasonable suspicion and they were terminated; zero tolerance.
>
> Q. Okay. If you have a drug or alcohol issue, you are terminated.
>
> A. Yes. We are dealing with the public safety and that is very important to us and, also, the reputation of our Company is very important.

Moreover, in the earlier case I cited an employee witness' testimony to the effect that the Company did not want "guys stoned driving your bus." In fact, the drivers were all subject to random drug/alcohol testing. The policy also manifested itself during the hiring procedures. Applicants who had convictions involving misuse of drugs or alcohol were not hired.

On the other hand, the policy is not as clear when a driver is only accused, without supporting proof, of violating the zero-tolerance policy. Certainly Respondent has cited no earlier circumstance where an arrest alone was sufficient proof of a policy violation. Nor is there any written rule about accusations short of convictions. In essence, Respondent is asking me to engraft a corollary to its zero tolerance policy. Moreover, from a societal point of view, accusations, without more, are not proof that the employee has in fact breached the policy. Something approaching scientific certainty, such a failing the drug screen, would be adequate. A conviction would also be sufficient.

Of course, scientific proof would not have been available in a case such as Benavides'. He was never accused of using the marijuana, only transporting it. And, it may be inferred from his testimony, he claimed he did so unknowingly. Had such a defense been credited, no conviction would have followed and he could not have been deemed to have breached Ryder's zero tolerance policy. Accordingly, even with the September arrest, no one had actually demonstrated that Benavides had contravened the zero tolerance policy until the judgment of conviction. Accordingly, Respondent's defense, based on the zero tolerance policy must be rejected. The Regional Director's specification is sustained in the amount of $4796.80.

Shawn Howell

Ryder hired Shawn Howell as a bus driver on February 5, 1997. It discharged her on June 6, 1997, though her last day of work was 3 days earlier, June 3. The profile and change form shows that she was discharged for attendance reasons, following the coding system seen in the earlier case (D2). That form was signed by Ryder's then General Manager, Wayne Fritz. [1]

It would appear from her testimony that Howell had completed her probation period at the time she was discharged. The General Counsel has referenced the 60-day probationary period set forth in the collective-bargaining agreement (in evidence in the previous proceeding as R.Exh. 4; see art. XXII, sec. 4 thereof), apparently anticipating an argument from Respondent that Howell was still on probation when her employment ended. Respondent has not made that argument, so in a sense the concern is moot. Yet, Howell was only employed about 90 days.

Instead, Respondent asserts, first, that Howell quit and was not discharged, Second, it contends that she failed to mitigate her backpay when she supposedly committed misconduct in allowing herself to be discharged by interim employer, Diversified Paratransit. It also wants an offset for Howell's work as a hairdresser.

The last, the hairdressing earnings is easily disposed of. Howell has moonlighted by doing hairdressing at her home since the 1980's, primarily for her family members and friends. She has done it while employed full time and also when she was unemployed. Moreover, it was intermittent. When she did decide to provide that service, it was only a few times a week at most; usually not even that frequently. While working for Ryder, she did not resort to that skill at all in the 5 months she was there, but she might have, had she remained. Typically, it was when she was 'low on money' and her needs had become more acute. At best she only earned about $20 or $30 a week. In any event, those earnings are so intermittent, they cannot be liquidated with any certainty.

Frankly, the hairstyling work appears to be mostly moonlighting; earnings she would have made even if she had remained employed by Ryder, whose pay rate, at her seniority level, was only $8 per hour. There is no reason to modify the specification based on something this elusive.

Respondent's principal defense is that Howell quit on June 3, 1997. The supporting document, inconsistent with the profile and change form discussed above, is an attendance report form dated June 3. It demonstrates that she had received two attendance points for being absent that date, showing a point total of 11 in a 90-day period. Howell acknowledged signing the document. Underneath her signature is a handwritten entry "OVERSLEPT"—"QUIT." She testified that, except for her signature, she did not write on the document at all. She also denied that she had quit. Respondent has not provided any evidence regarding the document, particularly who wrote the other words that appear on it. In that regard, it should be noted that in most companies, attendance/timekeeping records are frequently delegated to a nonsupervisory employee. Here we have no idea who wrote the document, when the final notation was made (before or after Howell signed it) or what the circumstances were. On the other hand, the employee profile and change form was reviewed by Fritz, Respondent's general manager, who approved the D-2, attendance rule reason.

[1] So identified when Fritz testified in the earlier proceeding on November 1, 2004.

Under the circumstances, it is fair to conclude that whatever the general manager said is more authoritative than the reason provided by an anonymous attendance record keeper, who made an entry exceeding the purpose of the form. Consistent with the personnel form approved by the general manager, Howell testified that she did not quit, but was fired. Therefore, I find that Respondent has not demonstrated that Howell quit her employment with Ryder.

As for losing her job with Diversified Paratransit, the facts are fairly straightforward. She apparently obtained this minimum wage job in the fall of 1997, 4 or 5 months after Ryder fired her. She had spent the intervening months caring for her sister's children, as the sister was not available to do so. Howell testified:

> Q. [BY MR. SILVERSTEIN] What was the first job you had after Ryder/ATE?
>
> A. [WITNESS HOWELL] I think it was a warehouse job. I think it was just a temporary little warehouse job. I worked a couple of warehouses, and then I started driving for another driving company.
>
> Q. What company was that?
>
> A. I believe that was Diversified Paratransit.
>
> Q. In fact, you only worked at Diversified for a very short amount of time.
>
> A. Yeah, because the pay was very low. It was like minimum wage, and we were like lifting up people and putting them on the bus lift, and it just wasn't worth it.
>
> Q. So, you resigned from Diversified because you were concerned you weren't earning enough money?
>
> A. I wasn't earning enough money. They fired me because I would miss days because I would try to go on interviews to try to get other jobs, and they knew that, so...
>
> Q. So, Diversified fired you for attendance issues?
>
> A. Well, they felt that I wasn't happy with my job, so, they basically let me go, and, I wasn't happy with my job.
>
> Q. But the actual reason was that you were missing work, right?
>
> A. Yes.
>
> Q. Now, you worked at Diversified—I'm sorry, you worked there for over a year, didn't you?
>
> A. Yes.
>
> Q. During the time that you worked at Diversified, you were unhappy with the pay that you were earning. How many other places did you apply to, to earn more wages?
>
> A. Oh, I didn't start applying until like maybe the end of my employment there, so I think I had maybe applied to maybe like two or three other places.

Respondent challenges Howell's right to look for other jobs, triggering her discharge from Diversified. That behavior, it contends, amounts to gross misconduct. In California, the minimum wage as of September 1, 1997, when Howell began working for Diversified Paratransit, was $5.15 per hour, [2] $2.85 less than the $8 she had been receiving at Ryder, less fringe benefits equivalent to Ryder's.[3] It is fair to observe that minimum wage in greater Los Angeles is insufficient to support oneself, much less a family, particularly a family thrust upon Howell by circumstances. I find her decision to work for Diversified Paratransit for over a year and to then seek a better situation is entirely reasonable. Indeed, I strongly disagree with those who would suggest that this job was substantially equivalent to the job she had had with Ryder. The only similarity was the driving; the wages were starkly different and the fringe benefits nonexistent. Although *Little Rock Airmotive*, 182 NLRB 666 (1970) is a striker case, it sets forth the considerations which must be examined to determine if a job is substantially equivalent. One of those is whether the new job provides fringe benefits. Diversified Paratransit did not provide them. Therefore, it was certainly not gross misconduct for Howell to try to find work that paid better; work that was at least more equivalent to the Ryder job than bare minimum wage work. *East Texas Steel Castings Co.*, 116 NLRB 1336 (1956).

Howell's comment that Diversified had determined that she 'wasn't happy' in that job makes sense in that context. She wasn't happy; under Board rules a discriminatee is entitled to look for a substantially equivalent job—even if she abandons a job to do so. The "lowering of one's sights" concept is hardly immutable. If a discriminatee is forced to lower her sights for a while in seeking interim employment, that choice does not mean that the sights cannot be raised again. However, one views these facts, Howell did not engage in gross misconduct in losing the interim job while looking for a better one.

Finally, Respondent argues that Howell failed to mitigate the backpay in general terms. This argument is unpersuasive as well. Her entire backpay period shows she held interim employment third quarter of 1997 through the end of the backpay period in the first quarter of 2002. As held in the previous case, evidence of an overall effort to seek employment overrides any concern that portions of the period should be rejected as evidence of a failure to mitigate. *Black Magic Resources*, 317 NLRB 721 (1995); *Rainbow Coaches*, 280 NLRB 166, 179–180 (1986).

Considering the evidence as a whole, as informed by Respondent's defense, I find that Respondent has not proven that Howell's backpay should be reduced beyond the adjustments the General Counsel has already made. Accordingly, Howell is entitled to the sum set forth in the specification, $34,597.40.

Ike Johnson a/k/a Ikey Williams

This claimant's birth name is Ike Johnson, but he prefers his mother's maiden name which is Williams, together with what would appear to be a family diminutive first name, 'Ikey.' I shall refer to him as Williams, though the compliance specification uses 'Johnson.' Johnson is currently incarcerated in the California prison system. His testimony was taken at the Lancaster State Prison.

[2] See the California Department of Industrial Relations webpage 'History of California Minimum Wage,' www.dir.ca.lwc/minimumwagehistory.htm. (Website last visited January 30, 2008.)

[3] See Appendix B of each of the collective-bargaining contracts in effect during the years 1996–2000, R. Exhs. 4 and 5, in evidence in the initial proceeding. These include funeral leave with pay, a health plan (which changed when the second collective-bargaining contract went into effect), paid holidays, paid vacations, and sick leave.

Ryder hired Williams in 1997. It had trained him as a bus driver and he succeeded in obtaining a Class B commercial drivers license with passenger and air brake endorsements. Although Williams is clearly subject to the stipulation set forth in General Counsel's Exhibit 1, that he was discharged as the result of the unlawful imposition of the attendance policy, neither the General Counsel nor Respondent have offered his employee profile and change form in evidence. As a result, I cannot determine the date Williams was hired.[4] Nevertheless, he testified that he was earning $8.50 per hour at the time he was discharged. He also acknowledged that the reason he was given for the discharge was that he had been late that day. He did not specifically refer to having acquired attendance points, but that may be inferred from the stipulation.

The backpay specification asserts that Williams's backpay period begins on May 21, 1997 and ends on January 23, 2002. It initially alleged that his net backpay was $113,346.08. After assessing Williams's testimony, counsel for the General Counsel has, in its brief, authorized a reduction to account for some previously unknown interim earnings. Nevertheless, the General Counsel has not suggested an actual figure.

Respondent has not concerned itself with an alternative figure, instead being content to argue that Williams failed to make reasonable efforts to search for work, thereby challenging the specification in its entirety. Assuming that its argument is not accepted, Respondent alternatively argues that Williams's backpay period should end in 1999 when he suffered a stroke rendering him unable to perform as a driver in the passenger industry. Finally, it asserts that Williams has been a long-time criminal and is now serving a lengthy sentence for the felony of armed robbery, having been arrested on July 4, 2001 and never released. In support, it points to some youthful convictions (one as a juvenile) for some misdemeanors. This last argument fails. Respondent's own policy concerning convictions does not apply to misdemeanors, only felonies. Even that allows for exceptions. See the earlier case, 350 NLRB 68, slip op. at 26 (Robinson application). Moreover, juvenile convictions need not be revealed as a matter of law. This defense is rejected.

I regard the 1999 stroke to be the most important issue here. In this regard Respondent has filed a Request for Judicial Notice, or in the alternative, a Motion to Reopen the Record. The request that I take judicial notice ("official notice" in Board proceedings) of several U.S. Department of Transportation regulations governing commercial drivers is actually unnecessary. Pointing to them is simply argument, based on public regulations which any judge may take into account to the extent necessary for a just result. The duty to reach a just result covers looking at both Federal and State statutes and regulations.

I start with the California rules concerning the licensing of drivers. These apply to all drivers, both commercial and noncommercial. Section 103900(a) of the California Health and Safety Code requires physicians to report[5] to the local health officer the identity of any patient older than 14, any disorder characterized by a lapse of consciousness. As seen in section (b) of that statute, the local health officer[6] is obligated to transmit that diagnosis to the Department of Motor Vehicles. Such a report will trigger an administrative inquiry by the DMV to determine if that individual remains competent to drive a motor vehicle on the state's streets and highways.[7] After it has made its inquiry, the DMV may revoke the individual's driving privileges or place limitations on them as deemed appropriate.[8]

Under California's scheme, therefore, certain steps are supposed to be taken to protect the public from a driver who has suffered a debilitation which prevents him or her from safely operating a motor vehicle. That scheme first requires a physician's report to a county health officer. That officer is to notify the DMV that a health issue has arisen regarding the driver who suffered the debilitation. This is followed by a DMV administrative proceeding to determine what steps, if any, the individual must take to retain his or her driving privileges.

Insofar as these rules were applied to Williams, his testimony only partially reveals what must have transpired. He had a stroke sometime in 1999, when he was 30 years of age. He was hospitalized and then unable to 'move' for 6 months. Williams: "I was down for about like six months where I couldn't move. . . When I had my stroke, I couldn't speak, I couldn't do nothing." It seems likely to me that following the statutory reporting mandate, the treating physicians at the hospital or afterwards reported the stroke, as required, to the appropriate county health official. Normally, that official would pass the information to the DMV; it would certainly be the expected routine. But on this record, the DMV never acted. Why not? The following testimony provides a somewhat obscured answer:

> Q. BY MR. SILVERSTEIN: After your stroke, were you ever given medical clearance to drive a commercial vehicle again?
>
> A. [WITNESS WILLIAMS] I never tried to—I always felt like that—because I was driving my car and all that kind of stuff. You know what I'm saying? And when you

[4] There is an error in the transcript at Tr. 204:17 to the effect that he was hired on about May 20, 1997. That is the day he was fired, not hired. Accordingly I direct that the word "hired" on l. 17, of that page be corrected to "fired."

[5] § 103900(a) Every physician and surgeon shall report immediately to the local health officer in writing, the name, date of birth, and address of every patient at least 14 years of age or older whom the physician and surgeon has diagnosed as having a case of a disorder characterized by lapses of consciousness. . . .

b) The local health officer shall report in writing to the Department of Motor Vehicles the name, age, and address, of every person reported to it as a case of a disorder characterized by lapses of consciousness.

[6] Normally the director of the county health services department.

[7] 13 CCR §110.01. *Factors Considered in Lapse of Consciousness Determinations.*

The department [DMV] may suspend or revoke the driving privilege of any individual that the department determines has a disorder characterized by lapses of consciousness or episodes of marked confusion, as defined in Title 17, Division 1, Chapter 4, Sections 2800 through 2808 of the California Code of Regulations, which affects the individual's ability to drive safely and/or to have reasonable control of a motor vehicle.

[8] 13 CCR §110.02.

have a stroke, you tend to be embarrassed and stuff like that right there because you would think that this right here would never happen to you. You know what I'm saying? So you tend to be shocked.

Q. So is the answer to my question that no doctor or company doctor or government agency ever certified you as fit to drive a commercial vehicle after you had the stroke?

A. I never tried to get a clearance or nothing like that right there at that time.

As a holder of a Class B license, Williams knew that his stroke had created a legal problem for himself. After the stroke, he still possessed that license. At the very least it allowed him to continue to drive his car. He did not want to lose that key to mobility. That key to finding a job. That key to appearing normal. He characterizes the problem as one of 'embarrassment.' In reality, it was one of practicality. The DMV didn't seem to be aware of his stroke, so why would he call their attention to it? If he had, he would have become subject to a DMV administrative inquiry which may well have cost him the privilege to drive at all, much less his Class B status.

On top of the state rules are the federal rules concerning commercial drivers, such as he. 49 CFR §391.45 (1998) sets forth the medical examination requirements,[9] while 49 CFR §391.41 sets forth the physical qualifications.[10] These are stringent and ongoing requirements which a commercial driver must always be able to meet.

Certainly, as Respondent argues, had the stroke occurred while Williams was driving buses for Ryder, Ryder could not have missed noticing it due to the absences it would have generated and the connected explanation. On his return to work, Ryder would have required recertification, a process which he seems unlikely to have accomplished.

In addition, it was a process which Williams desperately wished to avoid for he feared, and no doubt knew, he could not succeed. When he finally recovered his ability to walk, he walked, and still walks, haltingly. He minimizes it, describing it as a 'somewhat' limp. Something profound did occur here. No one has yet measured his reaction time, but it is highly unlikely given his current demeanor that he could operate brakes quickly enough to be regarded as safe while driving a bus. The risk of an accident is very high. I do not believe any public transit agency or company would be able to accommodate that risk. It would not put its passengers in such obvious jeopardy.

I conclude, based on Williams's poststroke behavior, his testimony and supported by my view of his physicality, that the stroke ended his career as a commercial driver and he has known it ever since he knew he could not regain full use of his legs. His behavior is a good barometer against which the truth of his testimony can be measured. Instead of qualifying his testimony as true, his behavior shows him to be untrustworthy on the point. I find, therefore, that Williams became unqualified to drive professionally when he suffered the stroke and chose to conceal his condition from the licensing authorities. Accordingly, his backpay period will be deemed to have ended when he suffered the stroke.

Williams could not recall with any certainty the date that he had the stroke, opining that it occurred in mid-1999. It seems reasonable, therefore, to stop his backpay at the end of the second quarter of that year. See generally the so-called 'hazards of living' rule set forth in *American Mfg. Co. of Texas*, 167 NLRB 520, 522 (1967). This same rule was invoked in the earlier proceeding with regard to claimants Clide Aaron and Natasha McQueen.

Respondent's argument that the entire specification should be stricken due to Williams's failure to make a reasonable effort to seek work must be rejected. Williams testified that he did seek work after he was discharged. It is true that he was unable to recall every effort but that is understandable given that 9 or 10 years had passed before he was called to testify about his efforts. Nevertheless, he did say that he applied at two bus companies, MTA (the City of Los Angeles Transit Authority) and Claremont Transit (the City of Claremont's Dial-a-Ride system) and also sought work with several temp agencies, including Labor Ready, finding some warehouse work. In that regard he became a certified forklift driver in 1998 and worked in various warehouses that year. He also remembered applying with Payless Shoe Stores. He was not able to allocate his unsuccessful searches to a particular year. The General Counsel correctly observes that claimants are not disqualified from backpay because of poor record-keeping or an uncertain memory. *Pat Izzi Trucking Co*., 162 NLRB 242, 245 (1966), and *Kansas Refined Helium Co*., 252 NLRB 1156 (1980). Accordingly, I conclude that Williams made reasonable efforts to find employment from the second quarter of 1997 through the second quarter of 1999.

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[9] In pertinent part: 49 CFR Part 391 reads:

Sec. 391.45 Persons who must be medically examined and certified.

Except as provided in Sec. 391.67, the following persons must be medically examined and certified in accordance with Sec. 391.43 as physically qualified to operate a commercial motor vehicle:

. . .

(b)(1) Any driver who has not been medically examined and certified as qualified to operate a commercial motor vehicle during the preceding 24 months; or

. . .

(c) Any driver whose ability to perform his/her normal duties has been impaired by a physical or mental injury or disease.

[10] 49 CFR Sec. 391.41 Physical qualifications for drivers.

(a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and, except as provided in Sec. 391.67, has on his/her person the original, or a photographic copy, of a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle.

b) A person is physically qualified to drive a commercial motor vehicle if that person—

. . .

(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;

(9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely; . . . .

Also, as noted above, the General Counsel agrees that some adjustments need to be made due to Williams's testimony that he had six or seven jobs which averaged 1-month in length and paid him $40–50 per day. These were paid in cash and no records exist to assist in the proper quarterly allocations. I shall therefore adjust his 1998 interim earnings by applying a $45-per-day interim earnings credit equally throughout the four quarters. That works out to 140 days (using a 5–day week for seven 4–week months. (1 month = 20 days. 20 days x 7 months = 140 days.) 140 days x $45 = $6300. One-fourth of $6300 = $1575 to be allocated to each quarter of 1998. The backpay chart then becomes:

Year qtr	Gross backpay	Interim earnings	Interim expenses	Net backpay	Medical/other	Total backpay
1997 2Q	2756.79	-0-	-0-	2756.79	-0-	2757.79
1997 3Q	6276.40	-0-	-0-	6276.40	-0-	6276.40
1997 4Q	6668.37	-0-	-0-	6668.37	-0-	6668.37
1998 1Q	6864.81	1685.00*	-0-	5179.81	-0-	5179.81
1998 2Q	6864.81	1575.00	-0-	5289.81	-0-	5289.81
1998 3Q	6864.81	1575.00	-0-	5289.81	-0-	5289.81
1998 4Q	6958.89	1575.00	-0-	5383.89	-0-	5383.89
1999 1Q	7006.03	-0-	-0-	7006.03	-0-	7006.03
1999 2Q	7006.03	-0-	-0-	7006.03	-0-	7006.03
Totals	57266.94	6410.00	-0-	50856.94	-0-	50,856.94

* Includes $110.00 from original specification.

Accordingly, based on the above modification, the backpay due Williams is $50,856.94.

Marcus Nelons

Marcus Nelons is the most elusive backpay claimant I have seen in over 40 years with the Board. His right to backpay arose with the Board's unfair labor practice decision set forth in its decision reported at 331 NLRB 889, dated July 31, 2000. That order was enforced on October 17, 2001 by the District of Columbia Circuit Court of Appeals. In the meantime, as Respondent became the successor with liability (per an agreement with the Board's Regional Director dated September 8, 2001), the Regional Office's compliance officer began trying to identify those employees affected by the unlawfully imposed attendance policy. At some point in that process he identified 37 employees, including Marcus Nelons. The identifications were generally made from Ryder's personnel records, including the profile and change forms seen throughout both this and the first compliance proceeding. The initial compliance specification was issued on May 27, 2004.

When the first hearing before me was coming to a close in mid-November 2004, it had become apparent to the parties that at least five of the identified individuals would not be located in a timely way. Avalos, moreover, had died in Mexico and very little was known about him. The General Counsel and Respondent entered into a stipulation (GC Exh. 7 in the 2004 proceeding) which I approved. It has been attached to the supplemental specification here. In addition, I later ordered Shawn Howell to be included. The purpose was to preserve these employees' situations for later examination, while at the same time to permit Respondent the opportunity to defend against those claims in the same manner as those who were then being presented in the first proceeding. At this point in the second proceeding, the only one still living who has not been presented in that fashion is Nelons.

In pertinent part, the stipulation Regarding the Missing and Deceased Discrimanatees listed their names, recited that there had been no opportunity to examine them and that their situations were to be put off until another day. That day, of course, is the instant proceeding. As part of that agreement, Respondent agreed to segregate and maintain under its control the sum of $643,589 which was the amount of backpay, plus interest, initially alleged to be owed to those individuals.

The fifth paragraph of the stipulation states, in pertinent part: "If any of the [ ] missing discriminatees are located within 1 year of the date of the Administrative Law Judge's Decision, the parties reserve the right to a supplemental compliance hearing to appropriately examine the discriminatees. [Reference to Respondent's reservation of certain defenses omitted.] This 1-year time limit applies only to locating the whereabouts of the missing discriminatees and to acquiring information relating to interim earnings of the deceased discriminatee (including whether or not he is still living). The 1-year time limit does not include the time it will take to conduct a compliance investigation or to hold a supplemental compliance hearing."

The sixth and final clause states: "If any of the [ ] named missing discriminatees are not located within 1 year of the Administrative Law Judge's Decision, then Respondent's obligation and liability owed the relevant discriminatee(s) will be

eliminated. [Limitation concerning the deceased discriminatee omitted.]

My decision issued on July 29, 2005. Therefore, under the terms of the stipulation, the compliance officials had 1 year from that date to locate all five of the living, missing claimants.

Beginning as early as 2002, counsel for the General Counsel and Respondent have both paid for numerous skip trace searches in an ongoing effort to find Nelon—to little or no avail. However, he momentarily surfaced in March 2006 and gave an affidavit to the Regional Office on April 20, 2006. In the affidavit, he provided an address and, apparently, a cellular telephone number. He also advised in May 2006 that he would keep in touch with the compliance office. The address he gave was essentially false; it certainly was not a residence. Respondent reports that it was a gasoline service station and that the operators, in 2007, told Respondent's process server that they did not know Nelon and had no information about him. Respondent also sent a subpoena to that address by FedEx. It was returned unclaimed. In August 2007 it attempted one last skip trace. Like the others, it was unsuccessful. In addition, the telephone number he had provided the Regional Office was no longer in service. It is clear that Nelons's promise to stay in touch has not been kept.

I am in agreement with the General Counsel that it located Nelons within the year provided by the stipulation. But my agreement only goes so far. The General Counsel wishes to now hold Nelons's backpay in escrow relying on the *Starlight Cutting*[11] policy of requiring respondents to hold the backpay sum for a missing discriminatee in escrow for a year and if the missing claimant cannot be found within that time, the claim will be considered to have lapsed. While I am sympathetic with the General Counsel's desire to take every reasonable step to see discriminatees are made whole for their losses, I do not find myself in agreement with the suggestion to further delay matters here. There must be a definitive end to litigation at some point.

Reviewing the matter, it appears that efforts to locate Nelons were begun as early as 2002. In May 2005 Respondent placed over $600,000 in an escrow-equivalent account as a guarantee pursuant to the stipulation. At that time Nelons's gross backpay was roughly $86,000. When he came into the compliance office in July 2006, he provided some information and authorized the Social Security Administration to provide his earnings records. This resulted in a downward adjustment to a net backpay of a little over $62,000.

His April 2006 promise to stay in touch with the Regional Office came to naught. Indeed, he provided what was essentially a false residence address and a cell phone number which was useless. I, for one, must consider the question of whether his appearance really constituted compliance with the 1-year requirement of the stipulation. Literally, of course, it did. Functionally, it did not, because he misled the Regional Office into thinking he could be found when needed. I do not fault him for changing his residence. I fault him for giving a false address in the first place. That, alone, demonstrates that he has no real interest in cooperating with the Board in its quest to remedy the unfair labor practices. But he compounded even that. He provided a cell phone number which became useless. Finally, he promised to advise of any changes in his contact information. That promise was not kept.

I find, in these circumstances, that Nelons has deliberately defeated the Regional Office's efforts to assist him with his backpay. Moreover, as of July 29, 2006, his money had already been kept available for a year as required by Starlight Cutting. Indeed, the money was still there at the time of this hearing, after another year had passed. Beyond that, Respondent made proper efforts to subpoena him to the August 21, 2007 hearing. Moreover, had he appeared in the Regional Office during the two hearing days held there (the second day was September 20, 2007) he would have been heard, for I declined to rule on Respondent's motion to strike the claim until the hearing was over. (The third and last day of the hearing was unavailable to him, as it was held in the secure area of a state prison, but he still could have contacted the compliance officer who in turn would have taken the proper steps and notified counsel for the General Counsel.) Despite these efforts and opportunities there was only silence coming from Nelons's end. He is, in the final analysis, a noncooperative backpay claimant.

Under all the circumstances, and for the reasons cited above, I will grant Respondent's motion to dismiss the backpay specification for Marcus Nelons.

Valerie Pedraza

Valerie Pedraza's backpay specification was modified twice, the second time after her testimony was completed. See Pedraza Exhibit 2. This modification took into account the time periods where she was not seeking work. Under that version, her backpay period begins on July 4, 1997 and ends on January 23, 2002. In essence, Respondent, whose counsel participated in the modification, has accepted it as accurate.

Respondent's only defense to the modified specification is its argument that she should be denied backpay altogether because she "wholly failed to make any efforts whatsoever to mitigate her damages." It is true that she did not seek interim employment until a year and a half had passed after Ryder discharged her. She had chosen to stay home to care for her children. Of course, that gap is not a reason to deny her backpay altogether; it is simply a reason to deny her quarterly gross backpay for the quarters where she was not in the job market. The most recent specification accomplishes exactly that. In fact, that specification also denies her two quarters in 2000 for the same reason. Pedraza testified, though, that she sought and obtained work at other times covered by the backpay period. The specification shows interim earnings at all other times. Indeed, her testimony explains it, though it is not necessary to recite it given Respondent's acceptance of the modified specification. Respondent's argument that Pedraza's specification be denied in its entirety does not address any more specific issue. Accordingly, it has not demonstrated that the specification is not reasonable.

As no other defense is before me, I shall accept the specification set forth in Pedraza Exhibit 2. She is entitled to the net backpay figure stated there: $25,703.18.

[11] 284 NLRB 620 (1987).

Tyrice Turner

Tyrice Turner's backpay period is very short as she died about a month after she was discharged. Her backpay period runs from June 17, 1997, to the date of her death on July 27, 1997. Respondent offered no evidence to demonstrate that Turner had removed herself from the job market during that time. Her backpay specification stands unrebutted. Accordingly, her estate is awarded the amount set forth in the specification: $2149.94.

CONCLUSION

The liquidated net backpay for each of the employees discussed in this second supplemental proceeding is set forth in the chart, together with the total.

Name of Backpay Claimant	**Net Backpay**
José Avalos	-0-
Denny Benavides	$4,796.80
Shawn Howell	34,597.40
Ike Johnson a/k/a Ikey Williams	50,856.94
Marcus Nelons	-0-
Valerie Pedraza	25,703.18
Tyrice Turner	2,149.94
Total Net Backpay	**$118,104.26**

Dated, Washington, D.C. February 22, 2008